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In The

Supreme Court of the United States

October Term, 1979

No. 79-260

CECIL D. ANDRUS, SECRETARY OF THE INTERIOR,

Petitioner,

vs.

STATE OF IDAHO, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF AMICUS CURIAE OF IDAHO CAREY ACT DEVELOPMENT ASSOCIATION IN SUPPORT OF RESPONDENT

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INTEREST OF AMICUS CURIAE AND CONSENT TO FILE

The Idaho Carey Act Development Association is an unincorporated Idaho association composed of seventy-six different member projects whose purpose is to assist their individual settlers in the acquisition, irrigation, reclamation, and development of desert lands in Idaho,

The Association and its member projects represent more than 2,530 individual applicants for Carey Act desert lands in Idaho. These individual applicants have made application to the Idaho Department of Water Resources to segregate and withdraw desert lands under the Carey Act, 28 Stat. 422, 43 U. S. C. 641, and to irrigate, reclaim and develop these lands. To date the 2,530 individual applicants have filed applications for segregation and withdrawal of more than 405,950 acres of desert lands within the State of Idaho. In most instances, the Idaho Department of Water Resources has accepted these applications and has petitioned the Department of the Interior for temporary withdrawal of the selected lands.

In processing the Carey Act applications submitted by the State of Idaho, the Department of the Interior has taken the position that: (1) The Department has uncontrolled discretion to approve or disapprove the applications for Carey Act lands; (2) A married woman living with her husband may not make a separate application for Carey Act lands; and (3) A home built on the dividing line between entries will not qualify as a residence for both entries. Each of these positions was challenged in the suit below in the District Court and judgment was entered against the government on each issue. That judgment was affirmed by the United States Court of Appeals for the Ninth Circuit. The government has chosen not to appeal the decision against it on the second and third issues.

Since the entry of the District Court judgment, the Department of the Interior has held all Carey Act applications in abeyance, pending a determination of the respective rights of the parties by this Court. As a result, no Carey Act entries have been allowed in Idaho since 1976.

The Idaho Carey Act Development Association is the proper spokesman for most of the individual settlers who have claims for Idaho desert lands under the Carey Act pending before the Department of the Interior. These individual settlers, who desire to develop irrigation projects under the Carey Act, are the real parties in interest in this lawsuit. It is their entitlement to desert lands that will be determined by the Court in this proceeding.

The Solicitor General and Attorney General for the State of Idaho have given written consent to the Idaho Carey Act Development Association to file a brief as amicus curiae. Copies of these written consents have been filed with the Clerk.

———o———

QUESTION PRESENTED

Whether by enacting the Carey Act, 43 U. S. C. § 641, Congress made its own judgment that upon complying with the statutory reclamation conditions, the desert land states were entitled to receive public lands for use by individual citizens, or whether Congress intended to leave the issue of entitlement to public lands to the unlimited discretion of succeeding secretaries of the Interior.

———o———

ARGUMENT

I. The Carey Act grants the desert land states an enforceable entitlement to public lands.

This case involves the interpretation of the Carey Act, 28 Stat. 422, 43 U. S. C. 641 *et seq.* The government maintains that the Carey Act establishes no entitlement to any public lands, and is merely a grant of discretionary authority to the Secretary of the Interior. The courts below held against the government and found that the Carey Act created enforceable rights in the desert land states.

The overriding principle of statutory interpretation is that courts should interpret the "words of these statutes in light of the purposes Congress sought to serve." *Chapman v. Houston Walfare Rights Organization,* 99 S. Ct. 1905, 1911 (1979). This case should, therefore, focus on determining the Congressional intent and purpose in enacting the Carey Act, and the Court should construe the Act in a manner to give effect to that intent.

The Carey Act was one of several federal programs enacted in the late 1800's to encourage the settlement and reclamation of the vast federal lands in the western United States. Unlike other land grant legislation like the Desert Land Entry Act, 43 U. S. C. 321-339, Homestead Act, 43 U. S. C. 161-302 and Timber and Stone Purchase Act, 43 U. S. C. 311-313 (repealed 1955) in which the federal government dealt directly with each individual settler, the Carey Act was an effort to involve the individual states in reclamation programs and have them initiate and supervise the settlement of desert lands. It represented a compromise between the faction of Congress that wanted the federal government to control reclamation

and take primary responsibility for the development and settlement of the public domain, and those advocating "states rights" or the opportunity for the states to decide and regulate settlement and growth on public lands within their borders. The proponents of the Carey Act felt that, given a chance, the states working in conjunction with private interests could best accomplish the reclaiming of arid western lands. 26 Cong. Rec. 8429-8431 (1894).

Because of favorable physical conditions, Idaho led the way in the reclamation of desert lands under the Carey Act. By 1912, over 30 separate projects had been accepted, including over 1,000,000 acres, and the amount reclaimed and patented was over 210,000 acres. *Hearing before the Comm. on Irrigation and Reclamation of Arid Lands,* 62 Cong., U. S. Senate, Carey Act, 1912, p. 12-13. However, by 1915 most of the Idaho desert lands irrigable by existing gravity flow methods had been reclaimed and very few claims were filed under the Carey Act for the next 50 years. In the 1960's, the development of effective sprinkler irrigation systems using deep wells as a source of water supply opened the possibility of reclaiming and irrigating thousands of acres of hitherto unusable desert lands. Interest in the Carey Act was suddenly rekindled and hundreds of claims were filed with the State of Idaho.

Because of the 50 year hiatus in the use of the Carey Act entitlements, almost all of the history of the Carey Act is found in Congressional debate, subsequent amendatory acts, judicial comments, and statements by contemporary treatise writers during the period from 1894 to 1920. This information, however, uniformly establishes that all those who dealt with the enactment, amendment and ad-

ministration of the Carey Act understood that it made important grants of enforceable entitlements to the desert land states. This history establishes that the Carey Act was a contractual grant between the federal government and the states to the effect that if the states would provide the organization and funding to select, reclaim, irrigate and settle desert lands, the federal government would then obligate itself to issue patents to the states or their assigns. The remainder of this argument summarizes the language, history, and policy of the Carey Act which leads to the conclusion that the District and Circuit Courts correctly construed the Carey Act.

II. The language of the Carey Act shows an entitlement to public lands.

The Carey Act authorizes the Secretary of the Interior to contract with the states to donate, grant, and patent desert lands. It provides:

> As fast as any state may furnish satisfactory proof . . . that any of said lands are irrigated, reclaimed, and occupied by actual settlers, patents shall be issued to the State or its assigns. 43 U. S. C. 641.

It would be difficult to state any more clearly the congressional judgment that patents were to issue as fast as any state furnished proof that the desert lands had been irrigated, reclaimed, and settled. Nevertheless, the Government attempts to find support for its position from three statutory phrases: (1) the Act "authorizes" the Secretary to enter into contracts, (2) the Act grants "not exceeding" three million acres in Idaho's case, and (3) the President must "approve" all contracts. None of these phrases is inconsistent with the congressional purpose that

is so clearly expressed in the other parts of the statute and its history and administration. "Authorization" would be necessary in either event, whether Congress intended to leave a discretion in the Secretary, or to require him to issue patents as fast as the irrigation and reclamation conditions were met. "Not exceeding" three million acres is merely a limit that recognizes that the states might or might not be able to satisfy the conditions for the full statutory authorization. Indeed, as of this date none of the desert land states has exceeded the limit. Finally, the requirement of presidential "approval" argues neither for nor against secretarial discretion. Approval would be appropriate in either case, in order to assure that the State had in fact met the conditions prescribed by Congress. In short, the three features of the statute relied upon by the Government are consistent with either secretarial discretion, or secretarial obligation to patent as fast as irrigation and settlement are proven. To determine which of these policies Congress in fact selected, other parts of the statute and its history must be consulted. That inquiry demonstrates a clear understanding by those who dealt with and administered the Carey Act that it obligated the Secretary to grant patents once reclamation had been completed.

III. Congress intended to grant enforceable entitlements in the desert land states.

The Congressional debate on the Carey Act makes it abundantly clear that Congress was granting an enforceable right to 1,000,000 acres of desert lands to the specified states and their citizens, subject to their duty to select, irrigate, and reclaim the lands. The overriding purpose

of the Congress was to get the desert lands into the hands of individual settlers in parcels of 160 acres each, but to do so in a way that would avoid the fraud and land speculation that had accompanied outright grants to the states. Accordingly, the Congress withheld the title to the lands until the states completed reclamation and settlement, but agreed to issue patents promptly when the conditions were met. 26 Cong. Rec. 8423 (1894). The Congressional debate is replete with references to the "grant," "ceding," "gifting," and "donating" of public lands to the desert land states. 26 Cong. Rec. 8388-8392, 8419-8434 (1894). The Congressmen well understood that they were making an enforceable grant, but protecting it with conditions:

> Now, here is a proposition which costs the government nothing, but simply donates these lands to the State, leaving them to bear the burden of irrigation and reclamation. Furthermore, it is provided that the title to these lands shall not pass to the States until it is shown to the satisfaction of the Secretary of the Interior that the lands have been reclaimed according to law and the money expended upon them. 26 Cong. Rec. 8391. (August 10, 1894)

The desert land states understood that the Carey Act granted them enforceable contract rights and that they had to accept the offer made by the federal government to receive those benefits. Each of the desert land states promptly enacted legislation accepting the "grants of land" made to them by the federal government in the Carey Act. See *Idaho Code* § 42-2001.

Furthermore, subsequent Congresses also recognized the rights and entitlements of the desert land states. Amendatory bills to the Carey Act and the congressional

debate on those bills referred again and again to the Carey Act as a "grant of 1,000,000 acres" to the states. The Act of June 11, 1896, 29 Stat. 434, 43 U. S. C. § 642; 42 Cong. Rec. 6436 (1908).

IV. Contemporary jurists and authors recognized the grant of rights.

Contemporary jurists, familiar with the history and purposes of the Carey Act, uniformly recognized that it constituted a conditional grant of public lands to the desert land states. The following statements are indicative of the judicial understanding of the purpose of the Carey Act:

> By the Carey Act the United States binds itself to donate, grant, and patent to a state, complying with stated conditions, desert lands, which the state may cause to be irrigated, reclaimed, and occupied. . . . Upon satisfactory proof, the Secretary of the Interior is directed to issue patents to the state or its assigns. *Idaho Irrigation Co. v. Gooding,* 265 U. S. 518, 521 (1923).

The underlying purpose of the acts of Congress in ceding the vast domain of desert lands within the territorial limits of the given state was, through the agency of the state government more immediately concerned, to speedily have them reclaimed. . . . But Congress did not make the grant to the state of such lands in mass to take effect in praesenti. The state was first to furnish satisfactory evidence to the Secretary of the Interior that the lands are irrigated, reclaimed, and occupied by actual settlers before any patent therefor should issue. *M'Kinny v. Big Horn Basin Development Co.,* 167 Fed. 770, 775 (8th Cir. 1909).

The United States had the power to make the offer to the state, to grant it the lands provided the

> state would reclaim them. Of this there can be no doubt. . . . We believe the acceptance was valid. The legislature having accepted the offer, its next right . . . was to provide a detailed method whereby the state could execute the acceptance and make it operative. This they have done. *State v. Wright,* 44 P. 89, 92 (Mont. 1896).

Authors and researchers have also concluded that the Carey Act constituted a "guarantee to each of certain states up to one million acres of such dry public land. . . ." (Peffer, *Use and Abuse of America's Natural Resources,* 1972, p. 20), or an agreement "to donate to certain states a quantity of land, not over 1,000,000 acres each, which they should cause to be settled, irrigated, and in part, cultivated." (Hibbard, *A History of the Public Land Policies,* 1924, p. 436), or "a measure to provide for a grant of up to a million acres to each of the states containing desert lands. . . ." (Gates, *History of Public Land Law Development,* 1968, p. 648). The exhaustive contemporary treatise of *Kinney on Irrigation and Water Rights,* 2d ed. (1912), Vol. III, at Sec. 1325, concludes that the Carey Act was a grant to the named states and that the states were required to enact legislation to accept the contractual offer made by the federal government.

V. Departmental precedent does not favor the government.

The answer to the government's argument that the Court should defer to administrative construction of the Cary Act is quite simply that there is no uniform administrative construction of the Act which favors the government. In fact, the earliest departmental statements on the Act explicitly recognize the existence of a grant to the

desert land states, a position directly contrary to that now taken by the Government. On February 9, 1901, Secretary of the Interior Hitchcock reported to the Senate committee on Public Lands concerning a proposed amendment to the Carey Act and stated in part as follows:

> The result is that the States will not receive *the full quota of the lands intended to be granted,* nor will the purposes of the Act be anything like accomplished, unless the limitation with respect to time be so changed that the period of ten years shall commence to run in each instance from the date of the segregation instead of from the date of *the original granting act.* . . .
>
> If this amendment is adopted, the result will be that *each State affected can from time to time obtain segregations of arid lands under this grant until the full amount of 1,000,000 acres is obtained.* . . . 34 Cong. Rec. 3295 (1901); See also *Senate Report No. 262,* 66th Congress, 1st Session (1901). (Emphasis added.)

There is no indication in the language of the Carey Act, in its legislative history, or contemporary comment that if a state complies with all of the conditions of the statute, the Secretary of the Interior still retains the authority to decide whether or not to transfer lands to the states. Such power and authority would create in the Secretary the discretion to effectively repeal the congressional judgment that once the conditions were met, the lands were to be granted. Clearly, if Congress had intended that the Secretary have such power to reverse its own policy decision, it would have said so. Moreover, such an interpretation would convert the Carey Act into a statement of policy or advice, something that would come about if the Secretary thinks it is a good idea. It

would leave the Carey Act policy subject to changes in administrations and changes in the Secretary of the Interior. There is no language to this effect in the Act because that simply was not the policy judgment made by Congress.

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CONCLUSION

The language of the Act, its legislative history, and contemporary judicial treatise commentary show that the Carey Act was a Congressional grant entitling each state to select and reclaim 1,000,000 acres of desert lands. Congress put no time limitations on this grant and the states are still free to complete their contractual obligations under this Act and obtain title to the remaining lands for the benefit of individual citizens. The Secretary of the Interior does not have discretion to set aside the Congressional mandate expressed in the Carey Act. The well reasoned opinion of the District Court should be affirmed.

Respectfully submitted,

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